84-148

NO. _____

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IN THE

Supreme Court of the United States

October Term, 1984

GERALD E. SMALLWOOD,

Petitioner,

v.

MICHAEL DECHENE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. IS IT CONSTITUTIONALLY PERMISSIBLE FOR THE STATE OF VIRGINIA, THROUGH ITS SUPREME COURT, TO REMOVE A JUDGMENT FOR FALSE IMPRISONMENT AND CONVERSION BY IGNORING THE STATUTORY STANDARD FOR THE VALIDITY OF AN ARREST BY A POLICE OFFICER WITHOUT A WARRANT FOR A MISDEMEANOR AND SUBSTITUTING A NEW AND SUBSTANTIALLY DIFFERENT STANDARD WITHOUT ALLOWING AN OPPORTUNITY TO MEET, IN AN APPROPRIATE TRIAL COURT SETTING, THE SPECIFIED ELEMENTS OF THE NEW DEFENSE, PARTICULARLY WHEN THE RECORD BEFORE THE SUPREME COURT OF VIRGINIA DOES NOT SUPPORT THE NECESSARY ELEMENTS OF THE NEW DEFENSE?

II. IS IT CONSTITUTIONALLY PERMISSIBLE FOR A STATE, THROUGH ITS POLICE FORCE, TO DEPRIVE A PERSON OF HIS LIBERTY AND PERSONAL PROPERTY WITHOUT PROVING HIS DEFENSE OF AUTHORITY TO MAKE THE ARREST OR HIS AUTHORITY TO SEIZE THE PERSONAL PROPERTY?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No._____

GERALD SMALLWOOD,

Petitioner,

v.

MICHAEL DECHENE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The petitioner, plaintiff in the Circuit Court of Fairfax County, Virginia and Appellee in the Supreme Court of Virginia, petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on January 20, 1984.

OPINIONS BELOW

The Order of the Supreme Court

of the United States granting petitioner an extention of time to file his petition for a writ of certiorari, dated May 24, 1984, appears in the Appendix (p. 1a). The denial of petitioner's request for rehearing, dated March 9, 1984, appears in the Appendix (p. 2a). DeChene v. Smallwood, _____ Va. _____, 311 S.E.2d 749 (1984) appears in the Appendix (pp. 5a-18a). The oral and written opinions of the Circuit Court of Fairfax County, Virginia, which were not reported, appear in the Appendix (pp. 30a-65a).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decisions of the Supreme Court of Virginia dated and entered January 20, 1984 and March 9, 1984 under 29 U.S.C. Sec. 1257 (3).

CONSTITUTION, STATUTES AND RULES INVOLVED

United States Consitution, Amendment XIV

> ... No State shall ... deprive any person of ... liberty, or property without due process of law ....

Virginia Code

> Section 18.2-189. The text of this statute appears in the Appendix (pp. 7a-8a, note 1).
>
> Section 19.2-81. ARREST WITHOUT WARRANT AUTHORIZED IN CERTAIN CASES. Members of the State Police force of the Commonwealth, sheriffs of the various counties, and their deputies, the members of any county police force, the members of any duly consituted police force of any city or town of the Commonwealth and the special policemen of the counties as provided by Sec. 15.1-144, provided such officers are in uniform, or displaying a badge of office, may arrest, without a warrant, any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence; and any such officer may, at the scene of any motor vehicle accident, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways of the Commonwealth, upon resonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend

such person without a warrant of arrest....

Virginia Supreme Court Rules

RULE 5:21. FORM AND CONTENTS OF PETITION FOR APPEAL; ASSIGNMENTS OF ERROR; OBJECTIONS IN TRIAL COURTS; EFFECTS OF FAILURE TO ASSIGN ERROR.

... Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.

RULE 5:35. DUTY OF APPELLANT TO PREPARE AND FILE APPENDIX TO BRIEF; TIME FOR FILING; NUMBER OF COPIES.

The appellant shall prepare and file, as a separate volume, an appendix to the briefs which shall contain the parts of the record that one germane to the assignments of error....

RULE 5:37. WHAT MUST BE INCLUDED IN THE APPENDIX.

The basic initial pleading (as finally amended), the judgment appealed from, any memorandum or opinion of the judge, ... the assignments of error, the assignments of cross-error, if any, and any testimony or incidents of trial germane to the errors and cross-errors assigned must be included....

STATEMENT OF THE CASE

This controversersy arose out of the arrest without a warrant, search, handcuffing, imprisonment, and the charging and prosecution of Gerald Smallwood (hereinafter "Smallwood") for the crime of defrauding a garage keeper (Va. Code, Sec. 18.2-189) by Police Officer, Michael DeChene (hereinafter the "Police Officer" or "DeChene"). Smallwood's automobile and another car collided on a Fairfax County highway. Officer DeChene was dispatched to investigate the accident. Finding the two vehicles locked together, DeChene radioed for a tow truck. In response, a tow truck operated by Dallas Lunceford arrived and separated the two vehicles. The Police Officer then left the scene (App. pp. 5a-6a). A disagreement arose between Smallwood and Lunceford concerning a fee Lunceford demanded for his services.

Unable to settle the matter at the accident scene, the parties adjourned to a nearby parking lot (a non-public place off the road) to leisurely examine the situation. When Smallwood persisted to assert that he did not owe the debt, Lunceford called for the Police Officer to report to the parking lot. Upon the arrival of the Police Officer, Lunceford stated that Smallwood had refused to pay his fee and that he, Lunceford, was "going to take this car back because he has a right to it." Smallwood made comments about his constitutional rights and again refused to pay the disputed debt. (App. pp. 33a-34a). DeChene tried to talk Smallwood into paying the alleged debt without success. Then there came a time when the Police Officer told Smallwood either to pay the fee to Lunceford or else he would arrest Smallwood

for defrauding a garage keeper (App. 34a). When Smallwood again refused to pay, DeChene arrested, searched, and handcuffed him. DeChene also seized the automobile Smallwood had driven to the parking lot. DeChene took Smallwood to the Fairfax County Adult Detention Center and secured from a magistrate a warrant charging Smallwood with defrauding a garage keeper. Smallwood was tried in the Fairfax County General District Court and acquitted (App. 7a). In connection with DeChene's impoundment of Smallwood's automobile, DeChene had a "Vehicle Tow-In and Inventory Record" prepared. This document stated that the automobile could be released upon proof of ownership and payment of towing and storage charges. Although Smallwood demanded return of the automobile, he did not pay the towing and storage

charges. The vehicle was never returned to Smallwood (App. 8a-9a).

Smallwood brought this action against the Police Officer in the Circuit Court of Fairfax County, Virginia for false arrest, false imprisonment, assault and battery, malicious prosecution and conversion. The trial court initially found for Smallwood on all counts. Later, upon request for reconsideration by DeChene, the finding of malicious prosecution was removed (App. 36a, 38a, 43a, 51a, 59a). Police Officer DeChene and Smallwood filed notices of appeal but only DeChene filed his Petition for Appeal timely. Smallwood requested and was granted permission to file a Brief in Opposition late. Smallwood included assignments of cross-error in his brief and requested that the appeal be granted to decide DeChene's request that the law of conversion

be changed in Virginia and Smallwood's assignments of cross-errors.

The Supreme Court of Virginia granted DeChene's petition for appeal. DeChene filed his Appellant's Brief and Smallwood filed his Appellee's Brief. DeChene did not file a Reply Brief. The Court reversed with final judgment for DeChene on the grounds that DeChene believed the criminal statute applied to the situation he observed and that it is a defense to a false arrest claim arising from an arrest by a police officer without a warrant for a misdemeanor, that a police officer allege and prove that he made the arrest in good faith and with a reasonable belief the arrest was valid (App. 12a-14a). The Court held the arrest was valid and summarily reversed the other judgments (App. 17a). The Court also held the 14 day period

for filing a Brief in Opposition was jurisdictional in the sense that, although the Brief itself may be allowed to be filed late, any assignments of cross-error included in the Brief would be too late to be considered (App. pp. 17a-18a, note 2).

Smallwood petitioned for a rehearing and pointed out that the authority for an arrest without a warrant for a misdemeanor in Virginia was statutory. (See Va. Code Sec. 19.2-81, quoted in relevant part above on page 3-4). Smallwood also pointed out that the "elements" of the "alleged crime" were not committed in the Police Officer's presence and that there was no proof that the police officer was reasonable in his belief the arrest was valid. The Supreme Court of Virginia added an irrebuttable presumption that the mistaken belief that Lunceford's "services"

were included as an element of the statutory crime was reasonable (App. pp. 16-17a). No response was made to the assertion that none of the elements actually specified in the statute were committed by anyone (See App. pp. 7a-8a for a complete quotation of the statute). Additionally, Smallwood pointed out that the seizure of the automobile was illegal regardless of the validity of the arrest because there was no authority for its taking.

The Supreme Court of Virginia has specified rules to be followed in appeals:

(1) Appellate review of Circuit Court judgment is not a matter of right in Virginia (Va. Sup. Court Rules 5:21, 5:27, 5:29, and 5:30;

(2) The Court will consider only errors specifically assigned (Va. Sup. Court Rule 5:21; Supra, page 4);

(3) The appellant shall prepare an appendix to the brief

which shall contain any testimony or incidents of trial germane to the assignments of error or cross-error. (Va. Sup. Court Rules 5:35 and 5:38; Supra, page 4);

(4) The Court by decision has held that the requirements of (2), above, are mandatory and failure to comply is fatal to the appeal (Vaughn v. Johnson, 215 Va. 323, 210 S.E. 2d 139 (1974)); and

(5) Failure to include the trial testimony requires that all findings of fact by the trial court are resumed correct and complete and must be accepted as conclusive. (Id.)

The complete appendix to the brief in the Supreme Court of Virginia is reproduced in the Appendix to this brief (pages 19a-69a). The trial testimony is not to be found there. Thus, in the Supreme Court of Virginia, no testimony of any witness or party is deemed germane by the police officer to his assignments of error or to Smallwood's assignments of cross-error.

Smallwood pointed out that the constitutional standard for the validity of an arrest by a police officer without a warrant for a misdemeanor did not apply in this case and that, in any event, there was no showing that the necessary elements of the affirmative defense were alleged. (DeChene's Answer to Smallwood's Motion for Judgment was not contained in the appendix to his brief to the Virginia court, but is included in the appendix to this petition, pp. 70a-73a). Also, there are no findings of fact by the trial court of the required proof of good faith and reasonableness concerning the arrest itself.

Consitutional claims were presented to the police officer prior to the arrest, to the trial court in the testimony, and to the Supreme Court of Virginia

in Appellee's Brief and in his Petition for Rehearing.

ARGUMENT

I. IS IT CONSTITUTIONALLY PERMISSIBLE FOR THE STATE OF VIRGINIA, THROUGH ITS SUPREME COURT, TO REMOVE A JUDGMENT FOR FALSE IMPRISONMENT AND CONVERSION BY IGNORING THE STATUTORY STANDARD FOR THE VALIDITY OF AN ARREST BY A POLICE OFFICER WITHOUT A WARRANT FOR A MISDEMEANOR AND SUBSTITUTING A NEW AND SUBSTANTIALLY DIFFERENT STANDARD WITHOUT ALLOWING AN OPPORTUNITY TO MEET, IN AN APPROPRIATE TRIAL COURT SETTING, THE SPECIFIED ELEMENTS OF THE NEW DEFENSE, PARTICULARLY WHEN THE RECORD BEFORE THE SUPREME COURT OF VIRGINIA DOES NOT SUPPORT THE NECESSARY ELEMENTS OF THE NEW DEFENSE?

A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of its officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts

> in the name and for the state, and is clothed with the state's power, his act is that of the state. (Emphasis added).

Ex Parte Virginia, 100 U.S. 339, 347 (1880).

The Supreme Court of Virginia has stated a new and substantially different standard for the validity of an arrest without a warrant by a police officer for a misdemeanor. The old standard was an objective one contained in a statute (Va. Code Sec. 19.2-81; quoted in relevant part, supra pp. 3-4). The new standard is:

> [I]t is a defense to allege and prove good faith and a reasonable belief in the validity of the arrest ... and in the necessity for carrying out the arrest ... in the way the arrest was made .... (Emphasis in the opinion).

(App. p. 12a; See also App. pp. 13a-14a). This new affirmative defense has both subjective and objective factual elements (Id.). Petitioner does not question the power of the State of Virginia

to change its laws in this manner; however, to reverse with final judgment (App. 17a) does not afford petitioner an opportunity to rebut the affirmative factual showings required by the new defense. In this sense it is similar in operation to an Ex Post Facto law as it applies to petitioner. All others are now on notice of the new law.

The trial court found that there was no probable cause for the police officer to believe a crime had been committed even though the court believed the police officer believed the criminal statute under which he made the arrest applied. The fact finding by the trial court was that this belief was not reasonable because the facts the police officer observed could not reasonably conform to the elements of the crime for which the arrest was made (App. pp. 35a-36a). The police officer was obviously

familiar with the statute since he extemporaneously referred to it specifically when he threatened to arrest Smallwood unless Smallwood paid the alleged debt to Lunceford (App. 34a). The statement of facts even in the Supreme Court of Virginia opinion shows that none of the elements of the alleged crime were committed by anyone and that the elements the police officer thought constituted the crime did not occur in the police officer's presence at the time and place of the arrest; the police was obviously not in hot pursuit. An offense is deemed to have been committed in the police officer's presence "when he has direct personal knowledge, through his sight, hearing, or other senses that it is then and there being committed." Galliher v. Commonwealth, 161 Va. 1014, 1021, 170 S.E. 734, 736 (1933). The Supreme Court of Virginia stated, however,

that the "crime" was committed in the police officer's presence (App. 13a). This point will not be pursued since the new Virginia law on the subject does not seem to require the "in the presence" element except to say that "in the presence" was presented as an issue before the Supreme Court of Virginia demonstrating petitioner's understanding that the Virginia arrest statute (supra, p. 3-4) applied.

The trial court mentioned probable cause in distinguishing this case from that of Yeatts v. Minton, 211 Va. 402, 177 S.E. 2d 646 (1970); however, the court's ruling was:

> [A] lawful arrest is a legal right to restrain another's freedom of movement.... What was the legal right? There was nothing in the law. The misdemeanor upon which Officer DeChene relied did not, in fact, exist as he believed it existed.
>
> Therefore, there was not a crime. There was not a misdemeanor for

> which one could be arrested under these circumstances.

(App. 36a-37a). Thus the trial court was applying the arrest statute (supra, p. 3-4) allowing some leeway in interpreting the objective observations which would imply any subjective elements in the alleged crime. (Any crime involving fraud would contain subjective elements). The test was still an objective one. Also, the statutory authority of a game warden to arrest without a warrant for violations of the State's game laws is contained in a different statute (Va. Code Sec. 29-32) than the statute which was thought applicable to this case (Va. Code Sec. 19.2-81; supra p. 3-4). 211 Va. at 404, 177 S.E. 2d at 648.

There was no allegation that the police officer was acting in good faith at the time of the arrest nor was there

an allegation that the police officer was reasonable in his belief that the arrest was valid. There is nothing in the record to show these required elements in the new Virginia arrest law. It is submitted that they are not there because even Police Officer DeChene had no way of knowing they were required under the Virginia law. A copy of DeChene's Answer to Petitioner's Motion for Judgment is contained in the Appendix (pp. 70a-73a). It is further submitted that there was no proof that the police officer was acting in good faith or that he reasonably believed in the validity of the arrest at the time of the arrest. The trial court found:

> ...Officer DeChene appeared on scene. What did he find when he came there? He found Mr. Lunceford who is alleging he is going to take this car back because he he has a right to it; Mr. Smallwood who is evidently making comments

> about his constitutional rights or whatever may be going to happen. The two parties are unhappy. One won't pay; and the other wants to be paid; and Officer DeChene attempted to resolve that issue.
>
> I think he tried to do it in a very fair fashion; and I find everything that's gone on that he did was fair in dealing with these people; but then there came a time when he made a statement to Mr. Smallwood. That statement, in effect, was: "Either pay the man or I'm going to arrest you under this specific statute" ... intent to defraud the garage keeper. (Emphasis added).

(App. 34a). The police officer was trying to resolve the issue of the alleged debt Lunceford claimed was owed to him by Smallwood. The trial court refused to make a finding of fact that the debt was actually owed by Smallwood:

> Now, Mr. Smallwood takes the position that he's not liable for those fees. It's not my province, I don't believe, in this case, to decide whether he's liable for those fees. He may or may not be.

(App. pp. 40a-41a). It is submitted that the fairness of the police officer's attempt to resolve the issue of the alleged debt does not amount to good faith in the arrest itself. The court found: "But then there came a time..." when the police officer threatened to arrest Smallwood unless he paid the alleged debt to Lunceford. Clearly any good faith which may have preceeded the threat did not continue past the threat to the actual arrest. It is true that the threat was a continuation of the police officer's attempt to get Smallwood to pay Lunceford the alleged debt. Also the seizure of the automobile with the condition that it could only be recovered by paying towing and storage fees (App. p.41a) was a continuation of that effort.

This appeal was prosecuted by the police officer with the belief

that his defense to the false arrest claim only required him to show that he made a reasonable mistake of law (App. p. 66a). There is nothing in the record on appeal to support the proposition that this was the standard suggested to the trial court. Also, the trial court did not make a factual finding that the police officer's belief the statute applied was reasonable. If there was evidence presented to the trial court on this point, it was not considered by the police officer germane to his assignment of errors (the issue on appeal) because a transcript of the testimony and incidents of the trial (although available (App. p. 30a)) was not made a part of the record on appeal (App. p. 20a; see also Virginia Supreme Court Rules 5:21, 5:35 and 5:37, supra, p. 4). The police officer did not feel any allegations made by

him in his pleadings in the trial court were necessary nor did he feel any of his testimony before the trial court was germane to any issue on appeal. But the new defense requires allegations to be made and that evidence be presented to prove his good faith and reasonable belief that the arrest was valid and that the manner of the arrest was reasonable. Smallwood proved the arrest, imprisonment, prosecution, and the taking of his personal property by the police officer. It was further shown that none of the elements of the alleged statutory crime were committed by anyone. It was then necessary for the police officer to prove the elements of his defense, his authority to make the arrest and seize the automobile. The Supreme Court of Virginia spells out precisely what constitutes the defense; however, the record does not

support the defense and it is submitted the court has ignored legislative enactments spelling out the authority a police officer has to make an arrest such as in this case. Also, the court completely ignored the claim that the automobile was seized without authority. The police officer did not even suggest the source of his authority other than to say it was seized because he had arrested Smallwood.

It is submitted that Police Officer DeChene did not make the required allegations and did not show the required proof because he did not know this was the law in Virginia. Smallwood did not attempt to rebut the required elements of the defense for the same reason.

Now, that the stated defense is the law in Virginia, the police officer should not receive final judgment based

thereon until the safeguards of the United States Consitution Amendment XIV due process clause have been provided petitioner Smallwood. It is further submitted that this is especially true where the new Virginia standard and the federal consitutional standard are apparently the same and the record before the Supreme Court of Virginia does not support the specified defense in any respect. This Court's direction to the Supreme Court of Virginia to allow Smallwood an opportunity to meet the new defense in an appropriate trial court setting.

II. IS IT CONSTITUTIONALLY PERMISSIBLE FOR A STATE, THROUGH ITS POLICE FORCE, TO DEPRIVE A PERSON OF HIS LIBERTY AND PERSONAL PROPERTY WITHOUT PROVING HIS DEFENSE OF AUTHORITY TO MAKE THE ARREST OR HIS AUTHORITY TO SEIZE THE PERSONAL PROPERTY?

The record in this case does not support any defense authorizing the

arrest or the seizure of Smallwood's automobile which was not contraband or the fruits or instrumentality of crime and was not illegally parked, abandoned or any threat to the safety or welfare of the public.

> ... A free country cannot afford to indulge the theory that the apprehension of the guilty by any means whatsoever is justified, for that is the path to tyranny. Doubtless more violators would be captured, but at the expense of vast intrusions upon the liberty and privacy of guiltless persons as well - an unacceptable price in a free society. The Supreme Court's most recent pronouncement in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676, for example, is plain reaffirmation of the established principle that summary arrests and searches on general suspicion, without warrants or probable cause, are intolerable even if in a particular instance such police behavior proves fruitful. The courts must with utmost firmness protect the constitutional rights of all, for if some are denied their rights today, others may be made to suffer the same deprivation tomorrow. (emphasis added)

Jones v. Peyton, 411 F.2d 857, 862 (4th Circ. 1969). Police Officer DeChene

had, at most, only a general suspicion that Va. Code Sec. 18.2-189 (App. pp. 7a-8a, note 1) had been violated by Smallwood. None of the many elements of the crime and particularly the one paramont one (storing a motor vehicle) were commiteed by Smallwood.

It is submitted that the Supreme Court of Virginia has used an expediency in an attempt to protect the actions of the State's police where the example being set is one which frustrates the constitutional rights of the people in Virginia. Direction from this Court is needed to deter this sanctioned intrusion on the right of the people in their personal freedom.

CONCLUSION

For the reasons presented above, a Writ of Certiorari should issue to review the judgments and opinion of the Supreme Court of Virginia.

Respectfully submitted,

Gerald E. Smallwood
Petitioner

Gerald E. Smallwood*
Post Office Box 196
Burke, Virginia 22015
(703) 455-0054

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of July, 1984 filed the required copies of this Petition for a Writ of Certiorari in the Clerk's Office, and have mailed with postage prepaid the required copies to David T. Stitt, Esquire and Robert L. Howell, Esquire at Office of the County Attorney; Fairfax County; 4100 Chain Bridge Road; Fairfax, Virginia 22030, Counsel for Michael DeChene.

G. E. Smallwood
Gerald E. Smallwood

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SUPREME COURT OF THE UNITED STATES

No. A-957

GERALD SMALLWOOD,
Petitioner,

v.

MICHAEL DeCHENE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6, 1984.

/s/ Warren E. Burger
Chief Justice of
the United States

Dated this 24th
day of May, 19 84.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of March, 1984.

Michael DeChene, Appellant,

against Record No. 811210
Circuit Court No. L-48487

Gerald Smallwood, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 20th day of January, 1984, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ Allen L. Lucy
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of January, 1984.

Michael DeChene, Appellant,

against Record No. 811210
Circuit Court No. L-48487

Gerald Smallwood, Appellee.

Upon an appeal from judgments rendered by the Circuit Court of Fairfax County on the 22nd day of April, 1981.

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in the judgments appealed from. Accordingly, the judgments are reversed and annulled. The appellant shall recover of the appellee the costs expended in the prosecution of this appeal and in the said circuit court.

Proceedings to enter such judgment as seems right and proper, this Court dismisses the appellee's motion for judgment.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/ Allen L. Lucy
Clerk

Appellant's costs:

Filing fee:	$25.00
Printing brief - Code Sec. 14.1-182 - Not to exceed $200	?
Printing appendix	?
Attorney's fee	50.00

Teste: /s/ Allen L. Lucy
Allen L. Lucy, Clerk

Present: All the Justices

MICHAEL DeCHENE

OPINION BY CHIEF JUSTICE
HARRY L. CARRICO

v. Record No. 81120 January 20, 1984

GERALD SMALLWOOD

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Thomas J. Middleton, Judge

In the trial court, Gerald Smallwood recovered three judgments totalling $7,025.00 against Michael DeChene, a Fairfax County police officer, for false imprisonment, assault and battery, and conversion of an automobile. Concluding that the judgments are erroneous, we reverse.

This controversy arose out of a minor traffic accident which occurred on March 29, 1979, when Smallwood's automobile and another car collided on a Fairfax County highway. Officer DeChene was dispatched to investigate the accident. Finding the two vehicles

locked together, DeChene radiod for a tow truck. In response, a tow truck operated by Dallas Lunceford arrived and separated the two vehicles. At this point, DeChene left the scene.

An argument arose between Smallwood and Lunceford concerning the $20.00 fee Lunceford demanded for his services. Unable to settle the matter at the scene, the two "adjourned" to a parking lot to "examine [the] situation." When Smallwood persisted in his refusal to pay, Lunceford called for Officer DeChene to report to the parking lot.

Upon DeChene's arrival, Lunceford stated that Smallwood had refused to pay the fee for the tow truck and that he, Lunceford, was "going to take [Smallwood's] car back because he [had] a right to it." Smallwood made comments about his constitutional rights and reiterated his refusal to pay. DeChene

then stated he would arrest Smallwood for defrauding a garage keeper unless Lunceford's fee was paid. When Smallwood again refused to pay, DeChene arrested, searched, and handcuffed him. DeChene also impounded Smallwood's car and directed Lunceford to tow it from the parking lot.

DeChene took Smallwood to the Fairfax County Adult Detention Center and secured from a magistrate a warrant charging Smallwood with defrauding a garage keeper. On May 18, 1979, with the Commonwealth's attorney prosecuting the case, Smallwood was tried on the charge in general district court and acquitted.[1]

---

[1]Smallwood was arrested and prosecuted under the following statute:

Sec. 18.2-189. Defrauding garage keeper. - Whoever stores a motor vehicle with any person, firm or corporation engaged in the business of conducting a garage for the:

1. Storage of motor vehicles;

In connection with his impoundment of Smallwood's car, DeChene had a "Vehicle Tow-In and Inventory Record" prepared. This document stated that the car could be released upon proof of ownership and payment of towing and storage charges. Although Smallwood demanded return of the car, he did not pay the towing

---

(footnote continued)

2. Furnishing supplies to motor vehicles; or

3. Alteration or repair of motor vehicles,

and obtains storage, supplies, alterations or repairs for such motor vehicle, without having an express agreement for credit, or procures storage, supplies, alterations or repairs on account of such motor vehicle so stored, without paying therefor, and with the intent to cheat or defraud the owner or keeper of such garage; or with such intent obtains credit at such garage for such storage, supplies, alterations or repairs through any misrepresentation or false statement; or with such intent removes or causes to be removed any such motor vehicle from any such garage while there is a lien existing thereon for the proper charges due from him for storage, supplies, alterations or repairs furnished thereon, in accordance with the provisions of Sec. 43-32 or Sec. 43-33 of this Code shall be guilty of a Class 2 misdemeanor.

and storage charges, and the vehicle was not returned to him.

In deciding this case, the trial court indicated that a police officer may make an arrest for a misdemeanor committed in his presence where, although he misperceives the facts he observes, "those facts could reasonably be seen to conform to [the] law," but not where he mistakenly believes the law has made criminal the conduct he observes. In other words, the court found that, in making an arrest, a police officer is protected from civil liability for a mistake of fact but not for a mistake of law. Proceeding on this basis, the court held that Officer DeChene's arrest of Smallwood was unlawful because the officer mistakenly believed Code Sec. 18.2-189 included the word "services" and made a crime of a motorist's refusal to pay a garageman's towing fee.

The trial judge apparently believed that our decision in Yeatts v. Minton, 211 Va. 402, 177 S.E.2d 646 (1970), created the mistake of fact/mistake of law dichotomy he found in Virginia law. There, we said:

> An officer has the duty to arrest a person who commits a misdemeanor in his presence, even though the officer has no arrest warrant.... And an arrest, though warrantless, is valid where the officer had probable cause to believe that a misdemeanor was committed in his presence, even though the action he observed did not in fact constitute a misdemeanor.

Id. at 405, 177 S.E.2d at 648 (citations ommitted) (emphasis added).

The mistake of fact involved in Yeatts consisted of the arresting officer's incorrect belief that the accused was "jacklighting deer," an offense under the game laws, when in fact he was engaged in perfectly legal activity. We held that because the accused's

actions "resonably appeared" to constitute a violation of the game laws, the arrest was lawful. Id. at 406, 177 S.E.2d at 649.

Because Yeatts involved only a mistake of fact, we did not discuss whether any set of circumstances would uphold an arrest against an alleged mistake of law. Nothing in Yeatts suggests, therefore, that had the officer's mistake been one of law, e.g., an incorrect belief that "jacklighting deer" had been made a crime when it had not, the arrest necessarily would have been unlawful.

We believe an arrest resulting from a mistake of law should be judged by the same test as one stemming from a mistake of fact, viz., whether the arresting officer acted "in good faith and with probable cause." Pierson v. Ray, 386 U.S. 547, 555 (1967).

This test "has been consistently read as meaning good faith and `reasonable belief´ in the validity of the arrest." Blivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 456 F.2d 1339, 1347 (2d Cir. 1972).

> [T]o prevail [under this test] the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so ... it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest ... and in the necessity for carrying out the arrest... in the way the arrest was made.... [A]s a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection.

Id. at 1348 (emphasis added). While Blivens involved federal law enforcement agents, the "good faith and reasonable belief" defense is available to state

law enforcement officials as well. Hill v. Rowland, 474 F.2d 1374, 1377 (4th Cir. 1973).

Smallwood argues, however, citing Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924), that under Virginia law, "good faith is no answer to [a false imprisonment] claim." But, as we pointed out in out Yeatts opinion, Crosswhite involved a warrantless arrest for a misdemeanor not committed in the officer's presence. Hence, we said, even if the officer in Crosswhite had probable cause to believe that a misdemeanor had been committed, the arrest was nontheless unlawful. Yeatts, 211 Va. at 406, 177 S.E.2d at 649. Here, the conduct of Smallwood which prompted his arrest occurred in Officer DeChene's presence; therefore, the legality of the arrest will turn on whether Officer DeChene acted in good

faith and with reasonable belief in the validity of the arrest.

The trial judge found that Officer DeChene "was acting in good faith and was attempting ... to effect a reasonable solution to the dispute between the operator of the tow truck and [Smallwood]." The judge also stated:

> Now, Officer DeChene has testified that he believed that [Code Sec. 18.2-189] was operable and effective and that he based his arrest of Mr. Smallwood on that statute; and I accept that fact. I believe ... that Officer De Chene believed that to be the case as he made the arrest.
>
> . . . .
>
> The situation here is that Officer De Chene believed that the law allowed him to make an arrest for services rendered by a garageman when, in fact, it did not.

We approve the trial judge's findings that Officer DeChene acted in good faith and that the officer believed Code Sec. 18.2-189 was "operable and

effective" with respect to the dispute between Lunceford and Smallwood. We would go one step further, however, and hold there was a reasonable basis for Officer DeChene's belief that Code Sec. 18.2-189 was operable and effective in the circumstances.

As part of his duties, Officer DeChene reported to the scene of an accident in which Smallwood was involved; the trial court found there was "an implication at least and a possible admission by Mr. Smallwood that he caused [the accident]." DeChene determined that it was necessary to call a tow truck to separate the two vehicles involved in the accident; the trial court found that Smallwood "implicitly... joined in the ordering of [the] tow truck." Hence, there was sufficient basis for Officer DeChene to believe that Smallwood was responsible for

the services of the tow-truck operator. Yet, Smallwood refused to pay those services.

While Code Sec. 18.2-189 does not mention either the term "tow truck" or the word "services," it is common knowledge that tow-truck services are necessary in many highway accidents and that often a damaged vehicle must be towed to a garage before it can be stored, supplied with parts, altered, or repaired. Hence, in many cases, towing services are essential to the practical operation of Code Sec. 18.2-189. Although we do not decide that towing services are in fact included in Code Sec. 18.2-189, we believe it is fairly arguable that such services are implicitly included in the statute's provisions; hence, there was a reasonable basis for Officer DeChene's belief in the

applicability of the statute and the validity of his arrest of Smallwood.

The trial court held that because the arrest was unlawful, Officer DeChene had falsely imprisoned Smallwood, had committed an assault and battery upon him, and had wrongfully impounded his car. Because we find the arrest not unlawful, the trial court's holdings and judgments in all three respects must be reversed. Final judgment will be entered here in favor of Officer DeChene on all three claims.[2]

Reversed and final judgment.

---

[2]Smallwood has assigned a number of cross-errors. Because, however, he did not assign the cross-errors timely, we will not consider them.

Rule 5:27 provides in pertinent part:

> Within fourteen days after the date on which [a] copy of the petition [for appeal] is mailed or delivered to counsel for the appellee, he may file a written brief in opposition to granting the appeal and he may include

(footnote continued)

> in his brief assignments of cross-error. No cross-error not then assigned will be noticed by this Court. [Emphasis added.]

Unquestionably, the word "then" in the second sentence of the quotation refers to the fourteen-day period fixed in the first sentence. And, while the first sentence is expressed in permissive terms (an appellee in a civil case may forego filing a brief in opposition), the second sentence is couched in jurisdictional language, demonstrating that cross-error, when assigned, must be included in a brief in opposition filed within the fourteen-day period fixed in the first sentence.

Smallwood did not file his brief in opposition within the fourteen-day period. Instead, without indicating he intended to assign cross-error, he moved for and obtained from this Court an extension of time within which to file the brief, and he filed it well beyond the fourteen-day period.

Had Smallwood indicated in his motion for extension that he intended to assign cross-error, the motion would have been denied. This Court's granting of the motion under the circumstances did not operate to extend the time for assigning cross-error, and, therefore, the assignments were filed untimely.

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

MICHAEL DeCHENE,

Appellant,

v.

GERALD SMALLWOOD,

Appellee.

RECORD NO. 811210

APPENDIX TO THE BRIEF
FROM THE CIRCUIT COURT OF
FAIRFAX COUNTY

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MOTION FOR JUDGMENT

COMES NOW the Plaintiff, GERALD SMALLWOOD, By Counsel, and moves this Honorable Court for judgment against the Defendant as more particularly set forth below, and in support thereof respectfully states as follows:

COUNT I

FALSE ARREST AND MALICIOUS PROSECUTION

1. Defendant, Michael DeChene, is and was at all times material hereto a Police Officer in employ of Fairfax County Police Department.

2. On or about March 29, 1979, Plaintiff, Gerald Smallwood, while driving his 1978 Plymouth Horizon Sedan, was involved in a minor automobile accident in Fairfax County.

3. As a result of the accident, Defendant, pursuant to his duties as a Fairfax County Police Officer, came to the scene of the accident.

4. The Defendant, after having inspected the vehicles involved, summoned to the scene Mr. Dallas Lunceford, a representative of Beltway Mobil, Inc.

5. Mr. Lunceford arrived on the scene driving a tow truck and pursuant to the orders of the Defendant, and over the Plaintiff´s objections, attached the Plaintiff´s car to his tow truck and raised the rear of Plaintiff´s car while the other car involved in the accident was driven away from Mr. Smallwood´s car. Mr. Smallwood´s car was then lowered to the ground and returned to Mr. Smallwood´s possession, custody, and control.

6. Mr. Lunceford then demanded payment of TWENTY DOLLARS ($20.00) from Mr. Smallwood, which payment Mr. Smallwood refused to make.

7. After said refusal, the Defendant [sic], Mr. Lunceford, and the owner of the other automobile repaired to a nearby parking lot to discuss the accident, where, after Mr. Smallwood again refused to pay Mr. Lunceford the amount of $20.00, the Defendant was summoned to the scene and arrested Mr. Smallwood for an alleged violation of Virginia Code Sec. 18.2-189.

8. During the course of this arrest, Mr. Smallwood was searched and handcuffed in public and held at the Fairfax County Adult Detension Center.

9. The said arrest was made unlawfully, maliciously, and without probable cause.

10. Following the said arrest, the Defendant maliciously and without probable cause, obtained a warrant charging Mr. Smallwood with the said

offense, and appeared as a witness against him at trial.

11. On May 18, 1979, Mr. Smallwood was tried in the General District Court of Fairfax County on the charge stemming from the said arrest, and found not guilty.

12. As a result of the arrest and prosecution, Mr. Smallwood has suffered open public humiliation and embarrassment, damage to his reputation, loss of employment opportunities, financial losses and mental anguish, and has incurred substantial legal expenses.

WHEREFORE, your Plaintiff prays that judgment be awarded in his favor against the said Michael DeChene in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), actual damages, and TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), punitive damages, together with his costs expended herein.

COUNT II

ASSAULT AND BATTERY

1. All allegations of Count I above are hereby incorporated by reference herein.

2. During the course of the said unlawful arrest, the Defendant assaulted and battered the Plaintiff by unlawfully searching, handcuffing, and handling his person.

3. The Defendant adjusted the said handcuffs unnecessarily tightly, causing painful injuries to the Plaintiff's wrists.

4. All of said actions were done unlawfully and maliciously.

WHEREFORE, your Plaintiff prays judgment in the amount of TEN THOUSAND DOLLARS ($10,000.00) actual damages and ONE HUNDRED THOUSAND DOLLARS ($100,000.00) punitive damages, together with his costs expended herein.

COUNT III

CONVERSION

1. All allegations of Count I are hereby incorporated by reference herein.

2. When Mr. Lunceford raised the rear of Mr. Smallwood's car, he damaged the said car.

3. Both Mr. Lunceford and the Defendant knew before Mr. Lunceford raised the back of Mr. Smallwood's car that such action would damage it.

4. When the Defendant arrested Mr. Smallwood, the Defendant directed Mr. Lunceford to retake possession of Mr. Smallwood's car.

5. Mr. Lunceford did so take possession of Mr. Smallwood's car, without Mr. Smallwood's permission.

6. Upon information and belief, Mr. Lunceford towed Mr. Smallwood's

car to the property of Beltway Towing and Storage, Inc.

7. Despite Mr. Smallwood's demand for the return of his car, Mr. Lunceford, Beltway Mobil and Beltway Towing and Storage, Inc. have refused to return said car unless Mr. Smallwood pays various towing and storage charges. Plaintiff has also incurred other damages by reason of the loss of his vehicle as aforesaid.

8. All of the aforesaid actions by the Defendant were done unlawfully and maliciously.

WHEREFORE, your Plaintiff prays that judgment be awarded in his favor against the said Michael DeChene in the amount of TEN THOUSAND DOLLARS ($10,000.00) actual damages and ONE HUNDRED THOUSAND DOLLARS ($100,000.00)

punitive damages, together with his costs expended herein.

GERALD SMALLWOOD

V I R G I N I A

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

GERALD SMALLWOOD, PLAINTIFF,	:	
VS.	:	AT LAW NO. 48487
MICHAEL DE CHENE, DEFENDANT.	:	

MONDAY, OCTOBER 20, 1980

FAIRFAX, VIRGINIA

THE ABOVE-ENTITLED CAUSE CAME ON TO BE HEARD BEFORE THE HONORABLE THOMAS J. MIDDLETON, JUDGE FOR THE CIRCUIT COURT OF FAIRFAX COUNTY, IN COURTROOM 5, FAIRFAX COUNTY COURTHOUSE, FAIRFAX, VIRGINIA, BEGINNING AT 11:01 A.M., WHEN THERE WERE PRESENT ON BEHALF OF THE RESPECTIVE PARTIES:

FOR THE PLAINTIFF:

CHESS, DURRETTE & ROEDER
BY: WYATT B. DURRETTE, JR., ESQUIRE
3900 UNIVERSITY DRIVE
SUITE 300
FAIRFAX, VIRGINIA 22030

AND

GERALD SMALLWOOD, PLAINTIFF;

FOR THE DEFENDANT:

KATHRYN M. ANDERSON
ATTORNEY AT LAW
ASSISTANT COUNTY ATTORNEY
4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AND

MICHAEL DE CHENE, DEFENDANT.

- - - - - - - -

EXCERPT OF PROCEEDINGS

(THEREUPON, THE COURT REPORTER AND WITNESSES WERE SWORN, ARGUMENTS WERE MADE BY COUNSEL FOR THE PLAINTIFF AND THE DEFENDANT, AND THE TESTIMONY OF WITNESSES WAS TAKEN, ALL OF WHICH WERE REPORTED BUT NOT ORDERED TRANSCRIBED BY COUNSEL FOR THE PLAINTIFF.)

THE COURT: I N ATTEMPTING TO EVALUATE THE EVIDENCE IN LIGHT OF COUNSEL'S FINAL REMARKS -- BOTH COUNSEL -- AND ESPECIALLY IN LIGHT OF THE CASE OF YEATTS VS. MINTON, 211VA.402, THERE

ARE SEVERAL PRELIMINARY DECISIONS WHICH I COULD MAKE; BUT I DON'T THINK I NEED MAKE; AND THEY ALL RELATE TO WHAT HAPPENED INITIALLY WHEN OFFICER DE CHENE FIRST CAME ON THE SCENE AND OBSERVED THESE PARTIES.

AN ACCIDENT HAD OCCURRED. THERE IS AN IMPLICATION AT LEAST AND A POSSIBLE ADMISSION BY MR. SMALLWOOD THAT HE CAUSED IT. HE MADE SOME STATEMENT ABOUT THE FACT THAT THE OTHER PARTY-- THE LADY--WASN'T GOING TO INCUR ANY DAMAGES; AND THERE WAS SOME TALK OF WHAT HER DAMAGES MIGHT BE IF PAID BY HIM; BUT I DON'T REMEMBER THE SPECIFICS OF THAT TESTIMONY. I INFER FROM IT THAT HE COULD HAVE CAUSED THE ACCIDENT.

THERE CAME A TIME WHEN THAT TOW TRUCK WAS ORDERED. ACCORDING TO OFFICER DE CHENE, THERE WAS AN AGREEMENT. ACCORDING TO MR. SMALLWOOD, THERE WAS NOT AN AGREEMENT. I THINK I WOULD

FIND THAT HE IMPLICITLY, IF FOR NO OTHER REASON, JOINED IN THE ORDERING OF THAT TOW TRUCK. I THINK THAT HE KNEW IT WAS BEING ORDERED AND IT WAS BROUGHT THERE; BUT I DON'T THINK IT'S RELEVANT TO MY DECISION AS I VIEW THE CASE.

I SEE OFFICER DE CHENE, AT BEST, FROM MR. SMALLWOOD'S POINT AS HIS AGENT; AND, AT HIS WORST, FROM MR. SMALLWOOD'S POINT AS AN OFFICER WITH A POLICE DUTY TO UNDERTAKE WHEN THERE IS A TRAFFIC RUSH ON ACTING AND BELIEVING WHAT HE IS DOING IS IN THE BEST INTEREST OF THE CITIZEN -- IN OTHER WORDS, TO MOVE THAT TRAFFIC PROBLEM OUT OF THE WAY AND RESOLVE THE ISSUE IMMEDIATELY.

NOW, THOSE THINGS HAPPENED; AND THE OFFICER LEFT THE SCENE. THE EVENT WHICH BROUGHT ALL THE PARTIES TOGETHER INITIALLY WAS CONSUMMATED. AT THIS POINT IN TIME, THE PARTIES THEN ADJOURNED

TO A NON-PUBLIC PLACE. IN THE SENSE "NON-PUBLIC", I MEAN THEY'RE OFF THE ROAD. THEY'RE ON A PARKING LOT SOMEPLACE; AND THERE, THEY ARE GOING TO, AT THEIR LEISURE, EXAMINE THE SITUATION.

AT THAT POINT IN TIME, THE VERBAL ALTERCATION OCCURRED BETWEEN MR. SMALLWOOD AND MR. LUNCEFORD. MR. SMALLWOOD REFUSED TO PAY. ACCORDING TO MR. LUNCEFORD, IT WAS THE SECOND TIME HE HAD REFUSED BEFORE THEY LEFT THE SCENE; BUT, IN ANY EVENT, THERE WAS A REFUSAL TO PAY; AND SOMETHING HAPPENED BECAUSE OFFICER DE CHENE WAS CALLED BACK TO THE SCENE. I INFER FROM THE EVIDENCE -- AND PERHAPS IT WAS DIRECTLY STATED -- THAT MR. LUNCEFORD WAS UNHAPPY WITH WHAT WAS GOING ON; AND HE ASKED THAT OFFICER DE CHENE BE RETURNED TO THE SCENE. IN ANY EVENT, OFFICER DE CHENE APPEARED ON THE SCENE.

WHAT DID HE FIND WHEN HE CAME THERE? HE FOUND MR. LUNCEFORD WHO

IS ALLEGING THAT HE IS GOING TO TAKE THIS CAR BACK BECAUSE HE HAS A RIGHT TO IT; MR. SMALLWOOD WHO'S EVIDENTLY MAKING COMMENTS ABOUT HIS CONSTITUTIONAL RIGHTS OR WHATEVER MAY BE GOING TO HAPPEN. THE TWO PARTIES ARE UNHAPPY. ONE WON'T PAY; AND THE OTHER ONE WANTS TO BE PAID; AND OFFICER DE CHENE ATTEMPTED TO RESOLVE THAT ISSUE.

I THINK HE TRIED TO DO IT IN A VERY FAIR FASHION; AND I FIND EVERYTHING THAT'S GONE ON THAT HE DID WAS FAIR IN DEALING WITH THESE PEOPLE; BUT THEN THERE CAME A TIME WHEN HE MADE A STATEMENT TO MR. SMALLWOOD. THAT STATEMENT, IN EFFECT, WAS: "EITHER PAY THE MAN OR I'M GOING TO ARREST YOU UNDER THIS SPECIFIC STATUTE", AND THIS STATUTE IS THE ONE WHICH IS THE SOURCE OF THE CONTROVERSY HERE. I THINK IT'S 19.2-189, IF I RECALL CORRECTLY; BUT IT'S THE INTENT TO DEFRAUD THE GARAGE KEEPER.

NOW, OFFICER DE CHENE HAS TESTIFIED THAT HE BELIEVED THAT THAT STATUTE WAS OPERABLE AND EFFECTIVE AND THAT HE BASED HIS ARREST OF MR. SMALLWOOD ON THAT STATUTE; AND I ACCEPT THAT FACT. I BELIEVE -- I BELIEVE THAT OFFICER DE CHENE BELIEVED THAT TO BE THE CASE AS HE MADE THE ARREST.

NOW, THAT BRINGS US, AS I VIEW IT, TO THE CASE OF YEATTS VS. MINTON, WHICH WE HAVE SPENT SOME TIME DISCUSSING ON BOTH SIDES. IN SUMMARY, WITHOUT GOING THROUGH THIS CASE IN ITS ENTIRETY, MY VIEW OF THE CASE IS THIS: THAT AN OFFICER WHO IS MAKING AN ARREST MUST LOOK AT THE LAW, AND THEN HE LOOKS AT A SET OF FACTS. IF THOSE FACTS COULD REASONABLY BE SEEN TO CONFORM TO THAT LAW, THEN HE HAS MADE AN ARREST WHICH IS PROPER -- IT HAS PROBABLE CAUSE. IF, ON THE OTHER HAND, HE LOOKS AT THE LAW AND HE LOOKS AT A SET OF

FACTS, AND THOSE FACTS DO NOT CONFORM TO THE LAW, THEN HE HAS NOT THE RIGHT TO MAKE THE ARREST.

THE SITUATION HERE IS THAT OFFICER DE CHENE BELIEVED THAT THE LAW ALLOWED HIM TO MAKE AN ARREST FOR SERVICES RENDERED BY AN GARAGEMAN WHEN, IN FACT, IT DID NOT. SO, WHEN ONE LOOKS AT THE LAW AND THEN LOOKS AT THE SITUATION, THE SITUATION DOES NOT, IN FACT, REFLECT THE LAW BECAUSE THERE IS NOTHING IN LAW WHICH ALLOWS THE GARAGEMAN A LIEN FOR HIS SERVICES IN A CASE OF THIS NATURE DESPITE WHAT MR. LUNCEFORD THOUGHT AT THE SCENE AND DESPITE WHAT THE OFFICER THOUGHT AT THE SCENE.

BECAUSE OF THAT, I BELIEVE THAT THE ARREST WAS ILLEGAL. I DON'T THINK THAT I CAN FIND PROBABLE CAUSE. THERE ARE A WHOLE -- A LAWFUL ARREST IS A LEGAL RIGHT TO RESTRAIN ANOTHER'S FREEDOM OF MOVEMENT, ONE OF THE THINGS THAT

I HAVE CONSIDERED HERE -- A LEGAL RIGHT TO RESTRAIN HIM. WHAT WAS THE LEGAL RIGHT? THERE WAS NOTHING IN THE LAW. THE MISDEMEANOR UPON WHICH OFFICER DE CHENE RELIED DID NOT, IN FACT, EXIST AS HE BELIEVED IT EXISTED.

THEREFORE, THERE WAS NOT A CRIME. THERE WAS NOT A MISDEMEANOR FOR WHICH ONE COULD BE ARRESTED UNDER THESE CIRCUMSTANCES.

NOW, IF THE ARREST IS ILLEGAL, THEN I MUST TURN TO THESE ALLEGATIONS AND TRY AND RELATE THEM TO THE SITUATION AT HAND; AND I FIND THAT THE ARREST WAS UNLAWFUL, THAT THERE WAS NO FOUNDATION IN LAW FOR IT; AND, SINCE THE FACTS WHICH WERE OBSERVED DID NOT CONFORM TO ANY EXISTING LAW, THERE WASN'T PROBABLE CAUSE.

THAT BRINGS ME TO THE QUESTION OF MALICIOUS PROSECUTION. AN ILLEGAL ARREST, I BELIEVE, CREATES AN INFERENCE

OF MALICE -- BEAR WITH ME FOR A MOMENT, AND I'LL VERIFY THAT FACT.

WE'LL, I THINK THAT I BETTER RETRACT THAT. THE THING I'M CONCERNED WITH IS ASSAULT AND BATTERY, AND ANY FORCE WHICH IS USED IN MAKING AN UNLAWFUL ARREST IS AN ASSAULT AND BATTERY. SO, WHAT WE HAVE IS AN ASSAULT AND BATTERY.

THEN WE HAVE THIS QUESTION OF THE MALICIOUS PROSECUTION. MALICIOUS PROSECUTION IS THE INSTIGATION OF CRIMINAL PROCEEDINGS BY ONE PERSON AGAINST ANOTHER MALICOUSLY AND WITHOUT PROBABLE CAUSE IF THE PROCEEDINGS ENDED IN A MANNER FAVORABLE TO THE PERSON PROSECUTED.

NOW, MALICE MAY BE INFERRED FROM A LACK OF PROBABLE CAUSE; AND THE QUESTION THEN THAT CONCERNS ME IS THIS: I FIND NO MALICE IN FACT. I THINK I'VE MADE THAT CLEAR ALREADY; BUT THE QUESTION THEN IS: IF THERE IS AN INFERENCE

WHICH IS TO BE DRAWN, HAS THAT INFERENCE BEEN REBUTTED. IT WOULD APPEAR THAT, ON ITS FACE, THAT THE ILLEGAL ARREST GENERATES A MALICIOUS ACT FOR THE PURPOSE OF A MALICIOUS PROSECUTION.

NOW, BASED SOLELY ON THAT INFERENCE, BECAUSE I FIND NOTHING ELSE WHICH WOULD GIVE ME CAUSE TO FIND MALICE SUFFICIENT TO DECLARE THAT A MALICIOUS PROSECUTION EXISTS IN THIS CASE, I FIND THAT THE PLAINTIFF SHOULD PREVAIL ON THE CAUSE OF MALICIOUS PROSECUTION AND ON THE COUNT OF ASSAULT AND BATTERY.

THE QUESTION OF CONVERSION HAS BOTHERED ME THROUGHOUT THIS TRIAL. I HAVE HEARD NOTHING TO REBUT THE ISSUE. I ASKED COUNSEL FOR THE DEFENSE IF THERE WERE ANY CASES KNOWN TO HER WHICH WOULD FLOW FROM A SITUATION WHERE, IF THE ARREST IS UNLAWFUL, IS THE CONVERSION OR THE IMPOUNDMENT UNLAWFUL; AND SHE CONCURRED THAT IT IS; AND I RECOGNIZE

THAT I ASKED HER THAT QUESTION WITHOUT THE BENEFIT OF ANY LAW BEING AVAILABLE TO HER. I WAS TRYING TO THINK THROUGH MYSELF THAT PROBLEM AT THAT TIME.

COUNSEL FOR THE PLAINTIFF HAS INDICATED THAT HE ONLY LAW AVAILABLE IS THAT ONCE A CONVERSION OCCURS, THAT THE ONLY REMEDY AVAILABLE IS TO SUE FOR THE FAIR MARKET VALUE OF THE ITEM CONVERTED.

I FRANKLY AM CONCERNED ABOUT THAT IN THIS CASE -- QUITE CONCERNED ABOUT IT. THE EVIDENCE IS THAT OFFICER DE CHENE HAD A VEHICLE TOW-IN AND INVENTORY RECORD PREPARED, WHICH IS PLAINTIFF'S 2; AND HE SAID IN HERE THAT THE VEHICLE MAY BE RELEASED TO THE OWNER UPON PROOF OF OWNERSHIP AND PAYMENT OF TOWING AND STORAGE FEES.

NOW, MR. SMALLWOOD TAKES THE POSITION THAT HE'S NOT LIABLE FOR THOSE FEES. IT'S NOT MY PROVINCE, I DON'T BELIEVE,

IN THIS CASE, TO DECIDE WHETHER HE'S LIABLE FOR THOSE FEES. HE MAY OR MAY NOT BE.

I THINK THAT THERE WAS A CONDITION-- "I AM TAKING THIS AUTOMOBILE AWAY FROM YOU BACAUSE YOU ARE BEING ARRESTED; AND YOU MAY HAVE IT BACK UPON PAYMENT OF TOWING AND STORAGE FEES AND PROOF OF OWNERSHIP, ASSUMING OWNERSHIP, AND PAYMENT OF THE TOWING AND STORAGE FEES." SO THAT A CONDITION HAS BEEN PLACED ON THE TAKING OF THAT AUTOMOBILE.

NOW, IT'S ARGUED THAT THE EXERCISE OF THE DOMINION IN CONTROL OVER THAT AUTOMOBILE AND TAKING IT, WITHOUT AUTHORITY, FROM ITS TRUE OWNER IS ALL THAT'S SUFFICIENT TO BRING THE CASE FOR CONVERSION; AND THAT NOTHING NEED BE DONE. THE OWNER NEED NOT ASK FOR IT BACK AGAIN, ALTHOUGH THERE WAS EVIDENCE THAT HE DID DEMAND IT BACK, AND THAT HE'S THEN ENTITLED

TO RECOVER FOR THE FAIR MARKET VALUE OF THE THING CONVERTED.

NOW, IF I ACCEPT THAT TO BE THE GENERAL LAW, I'M STILL CONCERNED BY THE FACT THAT THE TAKING WAS, UPON PROOF OF OWNERSHIP AND PAYMENT OF THESE FEES, YOU MAY HAVE IT BACK. THE ARGUMENT IS -- AND THERE'S NO REBUTTAL OF IT TO ME AT THIS POINT IN THIS CASE, NO REBUTTAL TO ME -- THAT THE ACT OF CONVERSION IS SUBJECT TO MITIGATION BECAUSE I AM TRULY CONCERNED BY THE FACT THAT, IF SOMEBODY CAN OBTAIN AN AUTOMOBILE FOR $20.00 PLUS A FEW STORAGE FEES, THAT HE HAS AN ABSOLUTE RIGHT NOT TO GO CLAIM IT AND LET THE AUTOMOBILE SIT AND THEN CLAIM $4,100.00 FOR IT. THAT DOES NOT SOUND FAIR; BUT BY THE SAME TOKEN, I HAVE NO LAW EXCEPT THE LAW CITED BY COUNSEL TO GO ON.

NOW, BECAUSE THAT IS THE LEGAL POSITION IN WHICH I FIND MYSELF, I

AM GOING TO RULE THAT THE CAR WAS CONVERTED. I'M GOING TO ASK COUNSEL FOR THE DEFENDANT TO SUPPLY ME WITH ANY LAW TO THE CONTRARY, IF SHE CAN; AND I'LL GIVE HER TEN DAYS TO DO THAT; BUT I'M GOING TO RULE RIGHT NOW. AS A RESULT OF ALL THIS, I FIND CONVERSION EXISTS.

HAVING SAID THAT, THE QUESTION IS: WHAT DAMAGES SHOULD BE FOUND? IT'S BEEN ARGUED THAT THERE IS A $300.00 FEE FOR ATTORNEY'S FEES WITH INTEREST FROM 3-19-80, AND I THINK THAT SHOULD BE AWARDED.

THEN WE HAVE THE DAMAGES FOR THE MALICIOUS PROSECUTION, FOR THE ASSAULT AND BATTERY, AND FOR THE CONVERSION. AS FAR AS THE CONVERSION IS CONCERNED, IT'S GROING TO BE $4,100.00 MINUS $75.00, I BELIEVE. I THINK $4,075.00 WAS THE FIGURE REQUESTED. THAT IS SUBJECT TO COMPLETE REMOVAL FROM THIS FINDING

SHOULD I FIND ANY LAW FROM COUNSEL THAT WOULD DISALLOW THIS SITUATION OR CAUSE ME TO DISALLOW THE RULING THAT I'M MAKING.

MR. DURRETTE: $4,025.00.

THE COURT: $4,025.00, THANK YOU. $4,025.00.

MR. DURRETTE: AND MIGHT I ALSO JUST TO CORRECT YOUR HONOR, YOU SAID THE INTEREST WOULD BE DUE FROM 3-19. YOU MEANT THE DAY OF THE TRIAL WHICH WOULD BE 5-19.

THE COURT: WAS IT '80 OR '79?

MR. DURRETTE: '79.

THE COURT: ALL RIGHT, 5-19; AND I HAVE TWO OTHER ALLEGATIONS THAT I HAVE TO DEAL WITH HERE. UNLAWFUL ARREST AND MALICIOUS PROSECUTION ARE TIED INTO ONE; AND THE ASSAULT AND BATTERY, I'M PUTTING INTO THE OTHER ONE.

NOW, IN MY OWN MIND, I HAVE RESOLVED THOSE DAMAGES; AND IT'S ALMOST IMPOSSIBLE

FOR ME TO DIVIDE THE TWO OF THEM IN ANY WAY. THERE HAS BEEN A MALICIOUS PROSECUTION. THERE HAS BEEN A TRIAL. I TAKE INTO ACCOUNT THAT THAT TRIAL WAS ALSO A PARTIAL VINDICATION OF THE PLAINTIFF. IT MAY BE A STRANGE WAY TO LOOK AT IT; BUT, BY THE SAME TOKEN, HE DID TRY THE CASE. HE WAS PUT TO THE TEST. HE WAS EXONERATED. TODAY, HE IS EVEN MORE EXONERATED THAN HE HAS BEEN AT ANY OTHER TIME BECAUSE HE IS PREVAILING IN THIS LAWSUIT; AND, ONCE AND FOR ALL, NO MATTER WHAT ANXIOUSNESS, ANXIETY, EMPLOYMENT RECORDS OR ANYTHING ELSE MAY OCCUR, THE ABSOLUTE FINAL TEST OF ALL THINGS HAS BEEN REACHED IN HIS FAVOR; AND I DON'T THINK THAT IT SHOULD, IN ANY WAY, CAUSE ANY PROBLEM FOR HIM IN THE FUTURE. I MAY BE WRONG ABOUT THAT, BUT IT WOULD SEEM TO ME THAT IT SHOULD NOT.

I HAVE RESOLVED UPON A FIGURE OF $3,000.00; AND I'M GOING TO DIVIDE IT $1,500.00 BETWEEN THE MALICIOUS PROSECUTION AND $1,500.00 FOR THE ASSAULT AND BATTERY.

SO, I HAVE $300.00 WITH INTEREST, PLUS $3,000.00, PLUS $4,025.00. THOSE WILL BE THE AMOUNTS AWARDED.

IS THERE ANY COMMENT WITH RESPECT TO ANYTHING I HAVE SAID IN ORDER THAT AN ORDER MAY BE PREPARED?

MS. ANDERSON: JUST NOTE MY OBJECTION, YOUR HONOR.

THE COURT: I WILL NOTE YOUR OBJECTION.

MR. DURRETTE: YOUR HONOR, I DID JUST HAVE ONE REQUEST; AND THAT IS--ONE COMMENT AND ONE REQUEST. THE REQUEST IS THAT, IF MS. ANDERSON FINDS ANYTHING, I WOULD LIKE AN OPPORTUNITY TO SUBMIT--

THE COURT: I'LL GIVE YOU AN OPPORTUNITY TO DO THAT. I'M GOING TO ASK YOU TO PREPARE THE FINAL ORDER, MR. DURRETTE.

MR. DURRETTE: CAN I WAIT UNTIL I GET THE TRANSCRIPT?

THE COURT: YES, SIR.

MR. DURRETTE: OKAY.

THE COURT: I'LL GIVE HER TEN DAYS, AND I'LL GIVE YOU TEN DAYS BEYOND THAT; AND, IF THERE'S ANY PROBLEM, YOU COME SEE ME; AND I WANT TO GET THE ORDER ENTERED AND NOT LEAVE THE CASE OPEN, ALL RIGHT.

MR. DURRETTE: MAY I JUST STATE ONE OTHER THING, YOUR HONOR? IN COMMENTING ON MY REPRESENTATION TO THE COURT ON THE LAW OF CONVERSION, SINCE THIS SEEMS TO BE A CONTINUING ISSUE, YOU INDICATED THAT I HAD REPRESENTED TO YOU THAT THE ONLY REMEDY MR. SMALLWOOD HAD AT THE TIME OF CONVERSION WAS TO SUE FOR THE REASONABLE MARKET VALUE.

IF I SAID THAT, I DID NOT INTEND TO. I MEANT TO SAY AND THOUGHT I SAID THAT HE HAD THE OPTION. HE COULD TAKE

THE PIECE OF PROPERTY BACK OR HE COULD TREAT IT AS A CASE OF CONVERSION AND SUE FOR THAT. I THINK HE HAS EITHER ONE.

THE COURT: I DIDN'T UNDERSTAND THAT. LET ME THINK THAT THROUGH AGAIN. YOU'RE SAYING THAT HE HAS THE OPTION OF TAKING THE PROPERTY BACK, BUT HE HAS NO DUTY TO TAKE IT BACK; IS THAT RIGHT?

MR. DURRETTE: RIGHT.

THE COURT: IN OTHER WORDS, YOU SAY IT'S HIS OPTION?

MR. DURRETTE: THAT'S CORRECT.

THE COURT: AND HE ELECTED, IN THIS CASE, TO SUE FOR FAIR MARKET VALUE?

MR. DURRETTE: THAT'S CORRECT, YOUR HONOR; AND THAT'S WHY I BELIEVE THE LAW IN THAT CASE DOEN'T APPLY; AND I THINK --

THE COURT: WELL, I WILL ACCEPT THAT STATEMENT AT THE SAME TIME, IT

DOES NOT CHANGE MY RULING IF IT'S CORRECT.

MR. DURRETTE: I SEE.

THE COURT: BUT, ON THE OTHER HAND, IN MY OWN HEART AND SOUL, I BELIEVE MITIGATION LIES IN HERE SOMEPLACE; BUT, IF IT'S NOT HERE, IT'S NOT HERE; AND THAT'S ALL THERE IS TO IT.

MR. DURRETTE: ALL RIGHT.

MS. ANDERSON: YOUR HONOR, ONE FURTHER COMMENT. THE DAMAGES YOU HAVE AWARDED ARE COMPENSATORY DAMAGES ONLY?

THE COURT: THERE WILL BE NO FINDING OF PUNITIVE DAMAGES.

MS. ANDERSON: THANK YOU, YOUR HONOR.

(THEREUPON, AT 6:20 P.M., THE HEARING IN THE ABOVE-ENTITLED MATTER WAS CONCLUDED.)

CERTIFICATE OF REPORTER

I, LORI J. NIQUETTE, DO HEREBY CERTIFY THAT I TOOK THE AUDIOGRAPHIC NOTES OF THE FOREGOING PROCEEDINGS AND THE SAME WAS REDUCED TO TYPEWRITING BY ME; THAT THE FOREGOING IS A TRUE RECORD OF SAID PROCEEDINGS; THAT I AM NEITHER RELATED TO NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION HEREIN; AND, FURTHER, THAT I AM NOT A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR FINANCIALLY OR OTHERWISE INTERESTED IN THE ACTION.

/S/ LORI J. NIQUETTE
LORI J. NIQUETTE
CERTIFIED VERBATUM REPORTER

January 20, 1981

Kathryn M. Anderson, Esq.
Office of the County Attorney
4100 Chain Bridge Road

Wyatt B. Durrette, Jr., Esq.
3900 University Drive
Fairfax, Virginia 22030

Re: Smallwood vs. DeChene
Law No. 48487

Dear Counsel:

This case was tried on October 20, 1980. At that time the matter was taken under advisement. The memoranda submitted and arguments of counsel have been considered. It is the conclusion of the Court that the Defendant is liable for conversion as well as for false imprisonment.

Plaintiff, Gerald Smallwood, was involved in an automobile accident on March 29, 1979, in Fairfax County. The Defendant, Michael DeChene, an officer of the Fairfax County Police, arrived to investigate the accident.

A tow truck was called to the scene by the Defendant to assist in separating the automobile. When they had been separated, the Defendant and the operator of the vehicle which the Plaintiff had struck left the scene.

An argument arose between the Plaintiff and the tow truck operator concerning the fee for separating the vehicles. The Plaintiff insisted that he had not summoned the tow truck and would not pay for it. The Defendant was recalled to the scene. The disagreement continued. The Defendant arrested the Plaintiff for a violation of Section 18.2-189 of the Code of Virginia and impounded his automobile. The Plaintiff was acquitted in the General District Court and then brought this action for false imprisonment and conversion of the automobile.

This Court has ruled that the Plaintiff was falsely imprisoned by the Defendant and took under advisement the question of Plaintiff's recovery for conversion.

It appears to the Court that a conversion of Plaintiff's vehicle took place.

> A conversion is any unauthorized dealing with the goods of another by one in possession whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily. Eastern Lunatic Asylum v. Garrett, 68 Va. (27 Gratt) 163 (1876). "Any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion." Buckeye National Bank v. Huff, 114 Va. 1,11 (1912). Credit Corp. v. Kaplan, 198 Va. 67, 75 (1956) (emphasis added)

The Defendant "wrongfully" impounded the Plaintiff's vehicle, there being no legal basis for the arrest of the Plaintiff. The impoundment deprived

the Plaintiff of possession of his vehicle, however temporarily that deprivation was intended to continue. The Defendant did not actually take the vehicle himself, but he did direct the tow truck operator to do so.

"A plaintiff in execution procuring a levy to be made on a stranger's goods is guilty of conversion, whether he takes possession or not." Buckeye National Bank, supra; and in Credit Corp., supra, the Court stated in reference to conversion that "it is not necessary that the wrongdoer apply the property to his own use." Id. at 76.

The Plaintiff has had the capacity to regain possession of his vehicle since shortly after it was converted. He was, however, under no legal duty to attempt to do so since "proof of demand and refusal is never necessary in trover, where there is proof of

an actual conversion." Eastern Lunatic Asylum, supra.

The Court believes that the Defendant was acting in good faith and was attempting to the best of his ability to effect a reasonable solution to the dispute between the operator of the tow truck and the Plaintiff. However, good faith is not an excuse for conversion. "When... conversion is proved, the Plaintiff is entitled to recover, irrespective of good or bad faith, care or negligence, knowledge or ignorance." Credit Card Corp., supra, citing 19 Michie's Jur., Trover and Conversion, Sec. 4, p. 27. See also, 89 C.J.S., Trover and Conversion, Sec. 48 (b), p. 554; 53 Am. Jur., Trover and Conversion, Sec. 36, p. 832.

The Court has read with interest the case of Mustola v. Toddy, 456 P. 2d 1004 (1969), supplied by the Plaintiff, in which the Oregon Supreme Court adopted

the conversion definition of Sec. 222A of the Restatement (Second) of Torts and wherein that Court expressed the view that the strong public policy favoring vigorous action by police officers compelled the creation of an altered standard in conversion cases against policemen acting in emergency situations. Mustola has not been embraced outside of Oregon and there is some question about its effect there. See, Remington v. Landholt, 541 P. 2d 472, 580, 582 (1975). (O'Connell, Chief Justice, specially concurring).

This Court must apply what is believed to be the law of Virginia as it exists at this time and as set forth above. It may be desirable that police officers should be afforded protection against actions for conversion in instances such as this one. Such

an issue is a matter for the General Assembly to act upon, not this Court.

Having determined the Defendant's liability, there remains the question of damages. "The measure of damages, in an action of trover for the conversion of personal property, is the fair value of the property at the time of the conversion...." Eastern Lunatic Asylum, supra, at 168; Stroley v. Fisher, 176 Va. 163, 167 (1940). "When the conversion is complete, the injury suffered, of course, is the value of what is converted." Buckeye National Bank, supra, at 11.

The appropriate measure of damages is then, the value of the Plaintiff's vehicle on March 29, 1979. It is irrelevant, in this regard, that the Plaintiff could have recovered his vehicle shortly after impoundment. "Where the conversion has taken place, the owner is not bound to receive back the property if tendered,

either before or after suit...." Id. at 10.

The Plaintiff has argued that the Defendant is also liable for the loss of use of the vehicle in question in the amount of $532.00. While it is true that the Plaintiff had no duty to mitigate his damages, the Court is not aware of any precedent in Virginia for awarding damages in a conversion action for the loss of use of the item converted. Plaintiff's request for damages for loss of use will be denied.

Mr. Durrette will please draft an appropriate Order and submit it to Ms. Anderson for approval as to form.

Very truly yours,

/s/ Thomas J. Middleton

April 1, 1981

Robert Lyndon Howell, Esq.
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Wyatt B. Durrette, Jr., Esq.
Maloney & Chess
3900 University Drive
Fairfax, Virginia 22030

Re: Smallwood vs. DeChene
Law No. 48487

Gentlemen:

It is the opinion of the Court that the Defendant Michael DeChene is not liable for malicious prosecution.

The statements contained in the transcript of Monday, October 20, 1980 beginning at line 9 on page 5 and ending at line 1 on page 9 do not support a finding of malicious prosecution. The statements included from line 11 on page 8 through line 1 on page 9 indicate to me that I concluded that the inference of malice was to be found as a matter of law and not of fact.

At line 19 on page 8 I made the statement: "Now, based solely on that inference, because I find nothing else which would give me cause to find malice sufficient to declare that a malicious prosecution exists in this case" indicates to me that a finding of malice was not made.

The finding of malicious prosecution is set aside.

On January 20, 1981, a letter was written to counsel by me. The first paragraph of that letter states: "It is the conclusion of the Court that the Defendant is liable for conversion as well as for false imprisonment." Upon a review of the law and the facts of this case, it is the opinion of the Court that the Defendant is liable to the Plaintiff for false imprisonment. Further, the sum of $1,500.00 is awarded

to the Plaintiff as damages resulting from the false imprisonment.

It is requested that Mr. Durrette prepare an Order to be presented to the Court after endorsement by Mr. Howell.

Very truly yours,

/s/ Thomas J. Middleton

FINAL ORDER

On October 20, 1980, this case came on for trial, at which time the parties appeared with their counsel.

Each counsel made an opening statement following which evidence was presented on behalf of both parties.

Both parties rested their case and the Court heard arguments on the law.

The Court's rulings were made on this date and in a letter opinion issued on January 20, 1981, a Motion to Reconsider was filed by the Defendant and the ruling of the Court was set forth in a letter opinion dated April 1, 1981.

The rulings of the Court ore tenus and in both letter opinions are incorporated herein by reference, and the final rulings are set forth as follows:

(1) The Defendant unlawfully arrested the Plaintiff;

(2) The Defendant used force in making the arrest and the use of such force constitutes an assault and battery;

(3) The Defendant falsely imprisoned the Plaintiff;

(4) The Defendant converted the automobile of the Plaintiff;

(5) The Defendant did not maliciously prosecute the Plaintiff.

WHEREFORE, for the reasons stated orally on October 20, 1980, and contained in the writton opinions of January 20, 1981 and April 1, 1981, all of which are incorporated by reference herein, it is hereby

ORDERED, ADJUDGED and DECREED that judgment is entered for the Plaintiff in the following amounts for the reasons indicated:

(1) For conversion of Plaintiff's automobile--$4,025.00 with interest at 8% from March 29, 1979;

(2) For false imprisonment--$1,500.00 with interest at 8% from October 20, 1980, and

(3) For assault and battery--$1,500.00 with interest at 8% from October 20, 1980.

Plaintiff's request for damages for malicious prosecution, attorneys' fees for defending the criminal charge, punitive damages and charge for loss of use are denied.

It is further ORDERED that the transcript of the proceedings held on October 20, 1980 are hereby made a part of the record in this cause pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia.

THIS ORDER IS FINAL.

ENTERED this 22nd day of April, 1981,

/s/ Thomas J. Middleton, Judge

PRESENTED AND EXCEPTION NOTED AS TO THE DENIAL OF ADDITIONAL DAMAGES AND THE FAILURE TO FIND MALICIOUS PROSECUTION

MALONEY & CHESS
3900 University Drive
Fairfax, Virginia 22030

By /s/ Wyatt B. Durrette, Jr.
Counsel for Plaintiff

SEEN AND EXCEPTION NOTED TO ALL RULINGS EXCEPT THE DENIAL OF DAMAGES FOR MALICIOUS PROSECUTION, ATTORNEYS' FEES FOR DEFENDING THE CRIMINAL CHARGE, PUNITIVE DAMAGES AND CHARGE FOR LOSS OF USE

Robert Lyndon Howell
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Defendant

ASSIGNMENTS OF ERROR

I. The trial court erred in holding a police officer liable for damages for false imprisonment, assault and battery, and conversion, where the police officer reasonably believed that a violation of Va. Code Sec. 18.2-189 had occurred, and where a special magistrate acting on the same information issued a warrant charging a violation of that same statute.

II. The trial court erred in holding that conversion of an automobile occurred in circumstances where a police officer was merely providing for the safety of the vehicle at the time of the arrest, and did not do or intend any act inconsistent with another's ownership of the car.

ASSIGNMENTS OF CROSS-ERROR

I. The trial court erred in holding there was no actual malice by DeChene in his treatment of Smallwood beginning with his extortion threat to Smallwood, and then his false arrest, his assault and battery, his false imprisonment, his conversion of Smallwood's automobile, his swearing to a complaint charging Smallwood with a crime involving fraud, his participation in the criminal prosecution of Smallwood, and his making of false statements under oath concerning Smallwood's conduct before, during and after Smallwood's arrest in the subsequent criminal prosecution and in the discovery and trial of this case.

II. The trial court erred in not finding DeChene guilty of malicious prosecution

in view of the clear showing of actual malice of DeChene.

III. The trial court erred in making an affirmative finding of a lack of actual malice on the part of DeChene.

IV. The trial court erred in not finding DeChene guilty of malicious prosecution even if no actual malice was found in view of the general situation which negates the rebuttal of the inference of malice based on the lack of probable cause to prosecute Smallwood for fraud.

V. The trial court erred in not ordering more substantial damages including punitive damages and attorney's fees based on DeChene's intentional misconduct including his own criminal acts which were not retracted

or rectified at the time or at any time subsequent thereto as would be expected of a reasonable clear-thinking person in DeChene´s position.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GERALD SMALLWOOD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AT LAW NO. 48487
	)	
MICHAEL DECHENE	)	
	)	
Defendant.	)	

A N S W E R

COMES NOW, Defendant, by counsel and responds to Plaintiff's Motion for Judgment as follows:

COUNT I

1. Admitted.

2. Admitted, except the Defendant objects to the term "minor" as being vague.

3. Admitted.

4. Denied.

5. The first sentence of Paragraph 5 is denied. The second sentence of Paragraph 5 is admitted.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

11. Admitted.

12. Denied.

COUNT II

1. The responses to Count I are incorporated by reference herein.

2. Denied.

3. Denied.

4. Denied.

COUNT III

1. The responses to Count I are incorporated by reference herein.

2. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 2 and therefore Defendant denies them.

3. Denied.

4. Admitted.

5. Denied.

6. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 6 and therefore Defendant denies them.

7. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 7 and therefore Defendant denies them.

8. Denied.

9. Defendant denies all allegations not otherwise admitted herein.

WHEREFORE, having answered the allegations contained in the Motion for Judgement, Defendant requests this Court to:

1. Dismiss Plaintiff's Motion for Judgment; and

2. Award Defendant such additional relief as the Court may deem appropriate.

Respectfully submitted,

MICHAEL DECHENE

By /s/ Kathryn M. Anderson
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By /s/ Kathryn M. Anderson
Kathryn M. Anderson
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
691-2421
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer was mailed, postage prepaid, to Wyatt B. Durrette, Jr., Esquire, CHESS, DURRETTE & ROEDER, P.C., counsel for Plaintiff, 3900 University Drive, Fairfax, Virginia 22030, this 1st day of April, 1980.

/s/ Kathryn M. Anderson
Kathryn M. Anderson